No. 77-1254

In the Supreme Court of the United States

OCTOBER TERM, 1977

CYRUS R. VANCE, SECRETARY OF STATE,
ET AL., APPELLANTS
v.
HOLBROOK BRADLEY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

WADE H. McCREE, JR.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

HERBERT J. HANSELL,
Legal Adviser,
Department of State,
Washington, D.C. 20520.

MICHAEL A. GLASS,
General Counsel,
United States Information Agency,
Washington, D.C. 20547.

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CITATIONS

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1A–8A) is reported at 436 F. Supp. 134. A prior opinion of the district court (App. D, *infra*, pp. 13A–24A) is reported at 418 F. Supp. 64.

JURISDICTION

The judgment of the district court (App. B, *infra*, pp. 9A–10A) was entered on October 14, 1977. A notice of appeal to this court (App. C, *infra*, p. 11A) was filed on November 10, 1977. On December 28, 1977, the Chief Justice extended the time for docketing the

appeal to and including February 8, 1978, and on January 31, 1978, Mr. Justice Brennan further extended the time to and including March 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8; *McLucas* v. *DeChamplain*, 421 U.S. 21, 31–32.

QUESTION PRESENTED

Whether Section 632 of the Foreign Service Act of 1946, which requires persons covered by the Foreign Service Retirement System to retire at age 60, violates the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

2. Section 632 of the Foreign Service Act of 1946, 60 Stat. 1015 as amended, Pub. L. 94–350, 90 Stat. 846, 22 U.S.C. (1976 ed.) 1002 provides:[1]

> Any participant in the Foreign Service Retirement and Disability System, other than one occupying a position as chief of mission or any other position to which appointed by the President, by and with the advice and consent of the Senate, who is not a career ambassador shall be retired from the Service at the end of the month in which the participant reaches age sixty and receive retirement benefits in accordance with the provisions of section 821, but whenever the Secretary shall determine it to be in the public interest, such a participant may be retained on active service for a period not to exceed five years. Any such participant who completes a period of authorized service after reaching age sixty shall be retired at the end of the month in which such service is completed.

[1] After this litigation began, but before the district court issued its final decision, Section 632 was amended by the Foreign Service Retirement Amendments of 1976, Pub. L. 94–350, 90 Stat. 846. The present version of Section 632, set forth here, does not differ in any material respect from the previous version.

STATEMENT

Appellees are six former and four current Foreign Service employees in either the Department of State or the United States Information Agency, and an organization representing such employees. They filed this suit to challenge the validity of Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. (1970 ed.) 1002. Appellees contended that the requirement that Foreign Service employees retire at age 60 violated their rights under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. 621 *et seq.* ("ADEA"), the Due Process Clause of the Fifth Amendment, Executive Order No. 11141, 3 CFR. 179 (1964), and applicable Civil Service Commission regulations. Appellees sought declaratory and injunctive relief against continued enforcement of the mandatory retirement provision. They also sought back pay and reinstatement.

The district court dismissed the primary non-constitutional claims, including the ADEA claim, on June 30, 1976 (App. D, *infra,* pp. 13A–24A). Appellees then abandoned their remaining non-constitutional claims. A three-judge district court was convened to consider the constitutional arguments.[2]

In response to appellants' motion for summary judgment, appellees argued that decision of the constitutional question required the presentation of evidence to show that there was no rational basis for distinguishing between Foreign Service employees, who must retire at age 60, and Civil Service employees, who may continue to work until age 70. Appellants contended that the constitutional issue was a question of law that could be disposed of without an evidentiary hearing. Although appellees never formally moved for summary judgment, the district court treated the case as if it had been submitted on cross motions for summary judgment.[3]

On the basis of affidavits from both sides and submissions in response to the court's request for supplementation of the record, the court declared the mandatory retirement provision of the Foreign Service Act unconstitutional (App. A, *infra,* pp. 1A–8A). The court acknowledged that "the distinction between

[2] Because this suit was filed before August 12, 1976, it is not affected by Pub. L. 94–381, 90 Stat. 1119, which repeals most provisions requiring three-judge district courts.

[3] During the hearing before the three-judge court, Judge Gesell and Judge Robb questioned counsel at some length about appellees' willingness to submit the case on the record as it then stood. The colloquy (Tr. 40–46) is less than pellucid, but it is plain that counsel for appellees did not formally request summary judgment.

Civil Service and Foreign Service employees is proper if there is a rational basis to support it" (*id.* at 3A). It concluded, however, that "[o]n the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny" (*id.* at 3A–4A).

The court did not discuss the legislative history of the mandatory retirement provision. It considered, instead, the limited record evidence, measuring the proffered justifications for the challenged classification against the court's own assessment of the employment conditions of Foreign Service and Civil Service employees.

The court found that "less than ten percent of the American civilians who work overseas for the Government are forced to retire at age sixty" (App. A, *infra,* p. 5A). It also determined that many of the overseas personnel not subject to early retirement have jobs similar to those of Foreign Service personnel and may be stationed in hardship posts. Finally, the court found that many Civil Service personnel spend significant portions of their careers abroad. The court concluded that a system under which some federal employees working abroad are "singled out" for early retirement is "patently arbitrary and irrational" (*id.* at 8A).[4] The court directed appellants to cease

[4] Under the impression that appellees also had challenged the constitutionality of mandatory retirement at age 70, the court rejected that argument in a footnote to its original opinion (App. A, *infra,* p. 3A n. 4). On being informed by appellees that no such challenge had been intended, the court struck all but the first sentence of footnote 4 (order of July 28, 1977).

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enforcing retirement at age 60 and to reinstate the individual appellees who had been involuntarily retired (App. B, *infra,* p. 10A).

THE QUESTION IS SUBSTANTIAL

The distinction between the mandatory retirement ages applicable to the Foreign Service and the Civil Service has existed for more than 50 years, and there is a rational basis for that distinction. The district court therefore erred in finding that distinction unconstitutional.

1. *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, held that mandatory retirement statutes must be upheld if they have a rational basis. The court sustained a state law requiring uniformed state police officers to retire at age 50. It explained (427 U.S. at 315–316; footnote omitted):

> Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective. * * *
>
> That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams,* 397 U.S., at 485.

A similar rational basis supports the distinction between the mandatory retirement ages applicable to the Foreign Service and the Civil Service.

Congress created the distinction in 1924, when it created the Foreign Service.[5] In 1920 Congress enacted the first general retirement system for federal employees. The statute established a mandatory retirement age of 70 for most Civil Service employees who had rendered at least 15 years of service.[6] Employees in the Diplomatic and Consular Services were not included. When Congress subsequently decided to reorganize the Diplomatic and Consular Services into a single Foreign Service, one of the most important goals of the reorganization effort was the creation of a retirement system for Foreign Service Officers. See H.R. Rep. No. 157, 68th Cong., 1st Sess. 7, 10, 16, 18 (1924); Hearings on H.R. 17 and H.R. 6357 before the House Committee on Foreign Affairs, 68th Cong., 1st Sess. 15, 127, 165–166 (1924).

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[5] Act of May 24, 1924, 43 Stat. 140.

[6] Act of May 22, 1920, 41 Stat. 614. The mandatory retirement of Civil Service employees at age 70 was sustained against a constitutional challenge in *Weisbrod* v. *Lynn,* 383 F. Supp. 933 (D. D.C.), summarily affirmed, 420 U.S. 940.

The 1924 act establishing this system fixed the age of retirement for Foreign Service Officers at 65.[7] The principal sponsor of the 1924 legislation explained that the reason for requiring Foreign Service Officers to retire five years before Civil Service employees was that Foreign Service Officers, like military personnel but unlike Civil Service employees, commonly were assigned to remote posts overseas and experienced difficult and unsettling changes in their modes of life. See, *e.g.*, 65 Cong. Rec. 7564–7565 (1924).[8]

The 1924 Act has been amended several times, but Congress has adhered to its determination that Foreign Service Officers should be required to retire at a lower age than civilian employees generally. In 1941, for example, Congress conferred discretionary power on the Secretary of State to compel the retirement at full pension of Foreign Service Officers who were at least 50 years old and had rendered 30 years' service, or to compel the retirement at partial pension of Officers who were at least 50 and had rendered 15 years' service (55 Stat. 189). This provision has since been repealed (60 Stat. 1038), but its legislative history demonstrates Congress' consistent assessment of the effects of overseas work on Foreign Service

[7] "When any Foreign Service officer has reached the age of sixty-five years and rendered at least fifteen years of service he shall be retired: *Provided*, That the President may in his discretion retain any such officer on active duty for such period not exceeding five years as he may deem for the interest of the United States." 43 Stat. 144.

[8] Some members of Congress sought to raise the retirement age for Foreign Service Officers to 70, but an amendment to do so was defeated. 65 Cong. Rec. 7586 (1924).

Officers. Both the House and Senate committee reports reprinted a letter from Secretary of State Hull, which stated (S. Rep. No. 168, 77th Cong., 1st Sess. 2 (1941); H.R. Rep. No. 389, 77th Cong., 1st Sess. 3 (1941)):

> Whereas it is well known that in all walks of life the age at which different individuals no longer find it possible to continue their maximum volume of work and activity, or to carry heavy responsibility with effectiveness, varies materially, experience has shown that the continued strain of 30 years or more of service representing this Government in foreign countries in widely different climates and environments makes it desirable both from the standpoint of the Government and of officers that retirements should be authorized by law, commencing at a minimum of 50 years of age. * * * [T]he Foreign Service is in many respects the most hazardous of the permanent commissioned services of this Government, when this country is not actually engaged in war. Foreign Service officers and their families are, even when the United States is at peace, not only subject to unhealthful conditions and extremes of climate (often without having suitable medical facilities available) but they are also subject to all the dangers of foreign wars, of civil strife in foreign countries, and of major catastrophes. * * *

The perils and discomforts to which Foreign Service Officers were exposed in 1941 have not appreciably diminished since then. American diplomatic missions have been established in an increasing number of disadvantaged countries, and the threat of terrorist ac-

tivity has grown in many areas. See Affidavit of Arthur Wortzel, pp. 3–5; Letter from Director General of Foreign Service to Civil Service Commission.

In 1946 Congress created a "selection-out" procedure for the Foreign Service.[9] Officers are ranked in "classes" and required to retire if they do not secure promotion ~~class~~ within a specified number of years. This system is designed to "force attrition in a career service at a more rapid rate than is achieved by ordinary retirements" in order to guarantee "that Foreign Service officers shall be promoted by selection on the basis of merit."[10] Under the 1946 statute, career ministers remained subject to mandatory retirement at age 65.[11] All other Officers were required to retire at age 60, an age that corresponded to the approximate age projected for the most senior Officers in Class 1, the rank immediately below career minister.[12] Class 1 Officers were not subject to selection-out, because the mandatory retirement provisions were expected to accomplish the desired result of ensuring turnover in that class.[13]

[9] Foreign Service Act of 1946, 60 Stat. 1015.

[10] H.R. Rep. No. 2508, 79th Cong., 2d Sess. 85 (1946).

[11] In the Foreign Service Retirement Amendments of 1976, Pub. L. 94–350, 90 Stat. 846, the mandatory retirement age for career ministers was lowered to 60.

[12] H.R. Rep. No. 2508, 79th Cong., 2d Sess. 92 (1946).

[13] *Id.* at 91. Class 1 officers were made subject to selection-out in 1955 (69 Stat. 25). In 1955 Congress also created a new class of Foreign Service Officers called "career ambassadors," one rank above career ministers. The mandatory retirement age for career ambassadors was fixed at 65 (69 Stat. 537).

The fact that selection out now applies to ~~career ministers and~~ Class 1 Officers does not detract from the validity of the congressional determination that retirement at age 60 should be required throughout the Foreign Service Retirement System. As the legislative history demonstrates, that decision was based on the characteristics of career service abroad in many different countries that vary widely in technological development, culture, climate, and attitude toward the United States. Those conditions affect the optimum career length of all Foreign Service employees, not only those near the top of the Foreign Service Officer ladder.

Between 1946 and 1976 Congress extended the coverage of the Foreign Service Retirement System.[14] In doing so, it periodically reaffirmed its earlier conclusion that mandatory retirement of Foreign Service employees should come at an earlier age than mandatory retirement of Civil Service employees. For example, in 1960, when a large group of technical, administrative, fiscal, clerical, and custodial employees of the Foreign Service were transferred into the Foreign Service Retirement System, Congress noted that this system is designed to give recognition to the need for earlier retirement age for career Foreign Service personnel who spend the majority of their working years outside the United States adjusting to new working and living conditions every few years."[15] Similar commentary is contained in a 1966 Cabinet Committee study of federal staff retirement systems,

[14] 74 Stat. 838, 82 Stat. 812, 814; 87 Stat. 722–723; Pub. L. 94–350, 90 Stat. 834. Under these acts, the great majority of employees in the Foreign Service of the State Department, the United States Information Agency, and the Agency for International Development, are entitled to benefits under the Foreign Service Retirement System. Not all persons in the newly-covered groups are subject to selection-out, but the Congressional purpose of requiring retirement at age 60 remains valid.

[15] H.R. Rep. No. 2104, 86th Cong., 2d Sess. 31 (1960).

submitted to Congress as an appendix to the annual report of the Bureau of the Budget and the Civil Service Commission on federal statutory salary systems. S. Doc. No. 14, 90th Cong., 1st Sess. (1967). That study states (*id.* at 112):

> The mandatory retirement age of 60 is set in recognition of the need to maintain the Foreign Service as a corps of highly qualified individuals with the necessary physical stamina and intellectual vitality to perform effectively at any of some 300 posts throughout the world including those in isolated, primitive, or dangerous areas. Retirement at age 60 also enhances the advancement opportunities of the most effective younger personnel and reduces the strain on the selection-out program.

Congressional recognition of the special stresses of an overseas career is also reflected in the decision to extend the Foreign Service Retirement System to career Foreign Service employees of the United States Information Agency in 1968 and the Agency for International Development in 1973. The House report on the latter measure declared that the Foreign Service Retirement System "provides more favorable conditions for retirement to compensate for some of the personal difficulties arising from overseas service." [16]

2. Congress thus had a rational basis for concluding that Foreign Service personnel should have a mandatory retirement age, and the decision to place that age at 60 is no more objectionable than the decision

[16] H.R. Rep. No. 93–388, 93d Cong., 1st Sess. 46 (1973).

of Massachusetts, upheld in *Murgia,* to set the age of 50 for state police officers' retirement. Increasing age brings with it increasing susceptibility to physical difficulties, and the fact that the individual appellees may be able to perform their tasks is no more dispositive here than in *Murgia.* The use of a mandatory retirement age "rationally furthers some legitimate, articulated state purpose" (*McGinnis* v. *Royster,* 410 U.S. 263, 270)—or so Congress was entitled to conclude. Disagreement with a legislative conclusion of this sort is not a reason to set aside a statute. See *Whalen* v. *Roe,* 429 U.S. 589; *Weinberger* v. *Salfi,* 422 U.S. 749.

The district court thought, however, that the equal protection component of the Due Process Clause precludes Congress from providing one retirement age for civil service employees and another retirement age for Foreign Service employees.[17] At least two bases strongly support Congress' choice, however.

[17] In September 1977, the House of Representatives passed H.R. 5383, a bill that would repeal the mandatory retirement age of 70 for Civil Service employees. See 123 Cong. Rec. H9985 (daily ed., September 23, 1977). This bill does not affect Foreign Service employees ~~Officers~~. The bill originally introduced in the House would have eliminated the mandatory retirement age for all federal employees, but the proposed legislation was restricted to Civil Service employees by an amendment adopted after the Chairman of the House International Relations Committee asked to conduct a separate review of the problems of the Foreign Service and stated that the committee would "review the retirement provisions affecting the Foreign Service at the earliest possible date" (*id.* at H9969 (remarks of Rep. Zablocki)). In October 1977, the Senate passed a different version of H.R. 5383, 123 Cong. Rec. S17303 (daily ed., October 19, 1977), and the bill is currently in conference.

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a. The Foreign Service is unique in the worldwide mobility of *all* of its employees. They must be ready to serve anywhere and are required by law to devote a substantial part of their careers to overseas duty. Approximately 60 percent of all Foreign Service employees are overseas at any given time.[18] Under Section 571 of the Foreign Service Act, 22 U.S.C. (1970 ed.) 961, Foreign Service employees may be assigned to domestic posts for more than eight consecutive years only on the personal decision of the Secretary of State. Foreign Service employees must be on call to relocate, to hazardous places, at a moment's notice. They are expected to serve in hardship posts, and they do not have the luxury of taking hardship duty on their own terms.

There is no similar presumption that persons in any of the employment categories cited by the district court will serve overseas for extended periods. Peace Corps volunteers typically are not career employees. The Foreign Agricultural Service has only a few employees overseas, and they serve abroad at their option.[19] Similarly, persons who work for the Agency for International Development on a contract basis have no career obligations and are not required to re-

[18] Defendants' Response to Request for Information, Exh. 5.

[19] 286 Department of Agriculture employees were located in foreign countries in 1975; only 80 of these were in hardship posts. Defendants' Supplementary Memorandum With Respect to Defendants' Response to Request for Information. 4,611 participants in the Foreign Service Retirement System were abroad in 1975 (Defendants' Response to Request for Information, Exh. 5).

main overseas for longer than the contract period. Approximately 30,000 Civil Service employees work overseas for the Department of Defense, but departmental regulations limit the overseas tenure of these employees to five years.[20] The percentage of Civil Service employees overseas at any given time is minuscule.

The most that can be said, we think, is that Congress would have had a good reason to require Civil Service employees who spend significant portions of their careers abroad to retire at 60. But that would have created awkward problems for the administration of the Civil Service and its retirement system, and Congress is not constitutionally required to prescribe a special retirement age for these employees in order to be able to deal effectively with the Foreign Service. Congress may attend to the special problems facing the Foreign Service without imposing similar measures everywhere else they may be desirable or appropriate. See *Califano* v. *Jobst,* No. 76–860, decided November 8, 1977, slip op. 10–11; *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489.

b. The Foreign Service employs only a small part of the entire civilian workforce of the federal government. But this workforce experiences special problems in addition to its overseas service. Unlike Civil Service employees, who may transfer from one agency to another and from the federal government to comparable jobs with private employers or state governments, Foreign Service employees (like military offi-

[20] Department of Defense Instruction 1404.8 (1968).

cers) cannot easily transfer to other employment, because there is no comparable employment. The Foreign Service deals with a special problem—the foreign affairs of the United States. The Foreign Service therefore employs a special corps of persons, who enter the Service during their youth and remain with it for substantial periods. There is little lateral mobility.

Because of this feature of the Foreign Service career, it has been necessary to use for some categories of employees a selection out program to winnow those who are not best qualified to assume additional responsibilities. The winnowing process allows new persons to enter the Foreign Service. The military, because of its similar career structure, also has a selection-out program. See *Schlesinger* v. *Ballard,* 419 U.S. 498. But selection-out does not apply to all employees, and even when applicable it is not fully effective for persons who have been consistently advanced in the past and have reached high positions. Selection-out for senior Foreign Service Officers may appear to be too ruthless for effective use, and the mandatory retirement age acts in some cases as an automatic selection-out by limiting the time any person may spend in his highest career post.[21] This use of a mandatory retirement age as a complement of a selection-out program

[21] "A mandatory retirement policy allows department heads to plan the training and advancement of their employees, and motivates young workers to acquit themselves well and advance through the ranks." *Johnson* v. *Lefkowitz*, 566 F. 2d 866, 869 (C.A. 2) (upholding retirement of Civil Service attorneys at age 70).

is rational; Congress is not limited to one tool for dealing with the problems of management in a federal agency.

3. The district court's decision rests on the proposition that Foreign Service and Civil Service employment are so similar that Congress may not establish different pay and tenure rules. It therefore calls into question the congressional determination that the Foreign Service should follow different recruitment methods, promotion patterns, selection-out procedures, pay scales, and retirement programs. In other words, the district court's decision questions the constitutionality of legislation creating the Foreign Service, with its own combination of benefits and obligations.

Whenever Congress establishes a separate service,[22] there are bound to be some differences in the terms and conditions of employment between that service and the regular Civil Service. Promotion patterns will be different; pay will be different; retirement is likely to be different. The present case represents an attempt by some Foreign Service employees to improve their lot by eliminating a condition of employment that they see as less favorable than the comparable Civil Service rule, while retaining the conditions of employment that are more favorable than the comparable Civil Service conditions. This process could be extended indefinitely (perhaps with Civil Service

[22] In addition to the Foreign Service and the military services, the Postal Service, the Public Health Service, and several other special services have been established by Congress.

employees as plaintiffs in the next suit), until the terms and conditions of employment are the same.

Congress has indicated, however, that separate career ladders and separate terms and conditions of employment go hand in hand. Foreign Service pay is typically higher than Civil Service pay.[23] Similarly, foreign service retirement terms have been adjusted in conjunction with the imposition of a lower mandatory retirement age.[24] Unless it is possible to conclude that all of these distinctions are irrational—indeed, that the decision to make the Foreign Service a separate service is irrational—it is insupportable for the district court to have "corrected" the one condition to which appellees object without regard to the other conditions in the employment "package" that appellees enjoy. But, for the reasons we have discussed,

[23] Foreign Service pay ranges from $8,902 to $58,245 annually, whereas Civil Service pay ranges from $6,219 to $58,245. Executive Order No. 12010, 42 Fed. Reg. 52365 (1977). (Pursuant to 5 U.S.C. (1976 ed.) 5308, however, the pay actually received may not exceed $47,500). We have been informed by the Department of State that the proportion of Foreign Service officers in the two highest pay steps exceeds the proportion of Civil Service employees in the three highest pay steps.

[24] Foreign Service retirees receive an annuity computed at two percent of the highest average salary for three consecutive years, multiplied by the number of years of service; Civil Service retirees receive an annuity computed at 1½ percent of salary for the first five years of service, 1¾ percent for the next five years, and two percent for the remaining years. Compare 22 U.S.C. (1970 ed.) 1076 with 5 U.S.C. (1976 ed.) 8339(a). Foreign Service personnel with 20 years' service may elect to retire at age 50, but Civil Service employees with 20 years' service cannot normally retire until age 60. Compare 22 U.S.C. (1970 ed.) 1006 with 5 U.S.C. (1976 ed.) 8336. There are numerous other differences.

it was not irrational for Congress to conclude that the Foreign Service and the Civil Service should be treated differently in some respects.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

LEONARD SCHAITMAN,
NEIL H. KOSLOWE,
Attorneys.

HERBERT J. HANSELL,
Legal Adviser,
Department of State.

MICHAEL A. GLASS,
General Counsel,
United States Information Agency.

MARCH 1978.

APPENDIX A

HOLBROOK BRADLEY ET AL., PLAINTIFFS

v.

CYRUS R. VANCE, SECRETARY OF STATE, ET AL., DEFENDANTS

Civ. A. No. 76-0085.

United States District Court,
District of Columbia

June 28, 1977

Before ROBB, *Circuit Judge,* and GESELL *and* FLANNERY, *District Judges.*

MEMORANDUM

PER CURIAM.

This case presents the question whether statutorily required retirement at age sixty for those persons covered by the Foreign Service Retirement System ("Foreign Service personnel") violates the equal protection guarantees embodied in the Fifth Amendment.[1] Plaintiffs are Foreign Service Officers who

[1] Plaintiffs originally had other claims which were presented to a single District Judge. The first, a contention that the mandatory retirement age violated the Age Discrimination in Employment Act, 29 U.S.C. § 633a, Executive Order 11141, 3 C.F.R. § 179, and Civil Service regulations, was dismissed on defendants' motion. 418 F. Supp. 64 (1976). A related claim was dismissed by Court Order on July 27, 1976, and a claim of discrimination in the application of the retirement age was dismissed by Stipulation of counsel on October 14, 1976.

were or will be forced into retirement at age sixty and an organization whose membership includes such officers. They seek declaratory and injunctive relief. This matter comes before the Court on defendants' motion to dismiss [2] or for summary judgment and plaintiffs' opposition thereto. At oral argument plaintiff cross-moved for summary judgment, but indicated that defendants could not prevail without supplementing the record. Defendants indicated a willingness for the case to be decided on the existing record. Following oral argument the parties were given an opportunity to submit additional evidence, and both sides did so.

Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. §1002, mandates retirement at age sixty for certain employees of the State Department, the United States Information Agency ("USIA"), and the Agency for International Development ("AID").[3] Generally, employees of the Federal Government need not retire at such an early age. Those employees covered by the Civil Service ("Civil

[2] Defendants initially argued that the Fifth Amendment does not apply because plaintiffs have no property interest and because they cannot challenge a portion of a statute under which they have received substantial benefits. These contentions have no merit.

[3] Any "participant" in the Foreign Service Retirement and Disability System, who is not a career ambassador or a chief of mission, must retire at age sixty unless the Secretary makes a special determination to waive retirement for five years. *See* 22 U.S.C. § 1002. Those "participants" are:

(1) Foreign Service Officers; (2) Foreign Service Reserve Officers with unlimited tenure (whether serving in State Department or USIA); (3) Foreign Service Information Officers; (4) Foreign Service Staff officers and employees with unlimited appointments (whether serving in State Department or USIA); and (5) Personnel serving in AID who have unlimited Foreign Service Reserve or Staff appointments or who are serving under Presidential appointment and meet certain other qualifications.

Service personnel") do not face mandatory retirement until age seventy. 5 U.S.C. § 8335. Plaintiffs claim that Congress has drawn an unlawful distinction by setting a lower retirement age for Foreign Service personnel than for Civil Service personnel.[4] Since neither "fundamental" rights nor "suspect" classes are involved here the distinction between Civil Service and Foreign Service employees is proper if there is a rational basis to support it. *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d (1973); *Mass. Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). Thus the simple issue presented here is whether the conditions of Foreign Service work are sufficiently different from the conditions of Civil Service work so that the earlier retirement age is rational. *Cf. Murgia, supra* at n. 8. The application of the "rational basis standard" does not require, though, judicial abdication. It simply means that the legislatively drawn distinction is presumptively valid, and that its challengers have a heavy burden in proving its invalidity. On the record established in this case, the early mandatory retirement age for Foreign

[4] This claim raises an issue about the lawfulness of forced retirement between the ages of sixty and seventy, *i.e.*, the difference between the Civil Service and the Foreign Service. Plaintiffs also claim section 632 discriminates between those who have reached age sixty and those who are younger. This second claim raises an additional issue about the lawfulness of forced retirement at age seventy and above. Defendants have offered affidavit testimony that Foreign Service personnel are incapable of working effectively over age sixty. Plaintiffs have not sufficiently rebutted this testimony as to those persons age seventy and above to raise an issue of material fact. Thus defendants are entitled to summary judgment as to the second claim.

Service personnel cannot survive even this most minimal scrutiny.

The Government presents two explanations for the retirement age distinction. It first says that the mandatory retirement age is rationally related to its interest in creating advancement opportunities for younger people. However, an interest in recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme. Furthermore, there is no obvious reason why such a rationale would not equally apply to the Civil Service, and defendants have presented none.

The second rationale is that Foreign Service personnel, unlike Civil Service personnel, tend to work overseas and they face, therefore, unusual physical and psychological difficulties. Sixty year olds are said not to have the vitality necessary to carry out overseas assignments, particularly in "hardship posts," due to the inherent effects of aging and the cumulative effects of a career spent in foreign lands. Furthermore, the Government contends that upon reaching age sixty people are more likely to need medical attention, which is often lacking in foreign posts.

The record compiled in this case conclusively establishes that Civil Service and other Government personnel work overseas in positions and locations comparable to those of Foreign Service personnel, without facing forced retirement at age 60. In 1976 there were over 58,000 American civilians working for the Government overseas. More than 38,000 were stationed in foreign countries, and about 20,000 were in the United States Trust Territories (*e.g.*, Panama, Samoa, Wake

Island).[5] Only 4,787 of these Government employees faced mandatory retirement at age sixty. Thus, less than ten percent of the American civilians who work overseas for the Government are forced to retire at age sixty.[6]

Not only are there substantial numbers of Americans working abroad not subject to early retirement; many of these people have jobs similar to those of Foreign Service personnel. The Foreign Service organizations (State Department, USIA, AID) had 7,792 American civilian employees working abroad in November, 1976. However, many of these employees have Civil Service status and the right to work until age seventy. In fact, almost forty percent of the Americans who work overseas for the Foreign Service agencies are subject to Civil Service retirement. In addition, AID often has its work performed on a contract basis by employees of other departments or agencies such as the Department of Agriculture and the Corps of Engineers. These employees, of course, may work until seventy. AID also contracts with private United States organizations to carry out much of its actual technical work. Employees of these or-

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[5] The Government has contended that it is the difficulty of living and working abroad that makes Foreign Service work distinctive. Any such difficulty should be equally present in the Trust Territories which, like foreign countries, may be considered "hardship posts" for Government employees. See 5 U.S.C. § 5941. Thus, it seems appropriate for comparison purposes to consider employees working in Trust Territories in the same category as those working in foreign countries.

[6] If those people working in Trust Territories are excluded from the calculation, the percentage of those facing early retirement only rises to above twelve and one-half percent.

ganizations are not required to retire at age sixty and quite commonly serve above that age. Nor is it true that Foreign Service personnel are unique in having to handle assignments to unusually difficult posts or "hardship" posts. Peace Corps volunteers (and AID contract personnel) are stationed almost exclusively in underdeveloped areas of the world. Furthermore, unlike Foreign Service personnel, they often live among the poorest segments of the local populance and face any adverse conditions that may exist. These assignments are obviously as taxing and strenuous as Foreign Service assignments. Yet, there is no upper age limit at all for Peace Corps volunteers. Affidavits indicate that many Peace Corps volunteers are, in fact, over age sixty, and that there has been no noticeable problem with medical services. Finally, it is clear that Civil Service personnel also work in "hardship posts".[7] Thus plaintiffs have convincingly shown that reaching age sixty is itself no bar to Government employment overseas. The vast majority of Americans working abroad for the Government do not face early retirement, although their work may be similar in all relevant respects to that performed by Foreign Service personnel.

There remains, though, the Government contention that Foreign Service personnel are unique in that they spend significant portions of their careers abroad, and that this has a cumulative impact so that by age sixty they are generally incapable of effective service. In essence the Government says that while non-Foreign Service personnel serve abroad, they do not follow careers overseas. Plaintiffs,

[7] The record does not allow a comparison between the number of Civil Service and Foreign Service personnel serving in "hardship posts."

through discovery, attempted to compile a statistical comparison of time spent abroad by Foreign Service personnel and by other Government employees. Defendants were unable to provide this data because of the nature of their recordkeeping systems. Thus plaintiffs have submitted the first ten pages of the State Department's *Biographic Register*[8] for June, 1974 (the last date for which it is available) and an attached explanatory exhibit. Of the twenty-five Foreign Service Officers listed in these ten pages who were over age fifty, the average length of time spent overseas was fifteen years and the average length of time spent in the Service in the United States was ten years. As a comparison plaintiffs have also submitted pages from the *Biographic Register* containing the names of thirteen Civil Service employees of the Agriculture Department's Foreign Service who are over age fifty and an attached explanatory exhibit. The average length of time spent overseas by these Civil Service employees was 11.2 years and an average of eight years was spent in the Service in the United States. The Court does not find this difference in time spent overseas significant. Several other exhibits also indicate that there are many Americans in the Civil Service pursuing careers overseas in the same way that Foreign Service personnel do.

The Government has made no attempt to counter the above showing. It merely maintains that since at any given time a far higher proportion of Foreign Service personnel are serving overseas than are Civil

[8] "The *Biographic Register* provides concise biographic information on personnel of Department of State and other Foreign Government agencies in the field of foreign affairs." *Biographic Register*, July, 1971, p. 11.

Service personnel, the system is rational. It is, of course, true that a statute is not unlawful merely because it creates an imperfect classification. *Dandridge* v. *Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970). If only a small number of personnel working overseas escaped the sixty-year age limit, the Government's point would be well taken. However, we are faced with a situation where tens of thousands of Americans are working for the United States Government overseas and only a tiny percentage are singled out for early retirement. Yet this small group does not appear to serve under any more difficult conditions than the others, nor do they seem to serve for a significantly longer period of time. This system is patently arbitrary and irrational. Thus plaintiffs' motion for summary judgment is granted and the mandatory retirement provision of section 632 of the Foreign Service Act is hereby declared unconstitutional and void. Participants in the Foreign Service retirement and disability system cannot be subject to automatic retirement until age seventy. Of course, Congress is not foreclosed from redrawing the statutory scheme to eliminate the arbitrary classifications now existing and imposing any rational mandatory retirement age. This decision does not affect those provisions of the Foreign Service Act which set forth retirement benefits or alternative means of retirement, whether voluntary or involuntary.

The claims of the individual plaintiffs for back pay and reinstatement must be reviewed. Counsel are directed to confer in light of this opinion and submit an appropriate form of order within two weeks resolving the claims for back pay and reinstatement.

Each party shall bear its own costs and fees.

APPENDIX B

United States District Court
For the District of Columbia

Civil Action No. 76-0085

HOLBROOK BRADLEY, ET AL., PLAINTIFFS

v.

CYRUS R. VANCE, SECRETARY OF STATE, ET AL., DEFENDANTS

ORDER

Upon consideration of Defendants' Motion To Dismiss or in the Alternative For Summary Judgment, Plaintiffs' Opposition thereto which has been considered as a cross-motion for summary judgment, the oral argument of counsel and the entire record in this case, and it appearing to the Court for the reasons stated in the memorandum opinion filed June 28, 1977, as modified by the order filed July 28, 1977, that Section 632 of the Foreign Service Act 22 U.S.C. § 1002 as amended, which required mandatory retirement at age 60 of several of the named plaintiffs is unconstitutional in that it violates the equal protection guarantees embodied in the Fifth Amendment, and it further appearing to the Court that individual plaintiffs who have been subject to mandatory retirement pursuant to this provision are entitled to back pay and reinstatement should they so elect, it is by the Court this 14th day of October, 1977

ORDERED that defendants' motion to dismiss or in the alternative for summary judgment be, and the same hereby is, denied, and it is

FURTHER ORDERED that plaintiffs' cross motion for summary judgment be, and the same hereby is, granted and it is

FURTHER ORDERED that Section 632 of the Foreign Service Act, 22 U.S.C. § 1002, as amended, is hereby declared unconstitutional and void, and it is

FURTHER ORDERED that defendants are to reinstate in the Foreign Service the individual plaintiffs who have been previously subject to mandatory retirement pursuant to section 632, if otherwise qualified under defendant's medical and security regulations, and to correct record of these individual plaintiffs to show that they had not ceased to serve as Foreign Service Officers and effectuate all compensation and other personnel actions which would have occurred had they not been so retired.

ROGER ROBB,
United States Circuit Judge,
GERHARD A. GESSELL,
United States District Judge,
THOMAS A. FLANNERY,
United States District Judge.

APPENDIX C

United States District Court for the District of Columbia

Civil Action No. 76–0085

HOLBROOK BRADLEY, ET AL., PLAINTIFF
v.
CYRUS R. VANCE, ET AL., DEFENDANTS

NOTICE OF APPEAL

Cyrus R. Vance, Secretary of State; John E. Reinhardt, Director of the United States Information Agency; Alan K. Campbell, Jule M. Sugarman, and Ersa H. Poston, Commissioners of the United States Civil Service Commission; and the United States of America, defendants in the above-styled action, appeal to the Supreme Court of the United States from the final judgment of the district court entered in this action on October 14, 1977. This appeal is taken under 28 U.S.C. 1252 (1970) and 28 U.S.C. 1253 (1970).

Dated at Washington, D.C., this 10th day of November, 1977.

Respectfully submitted,

EARL J. SILBERT,
United States Attorney,
ROBERT N. FORD,
Assistant United States Attorney,
JOHN R. DUGAN,
Assistant United States Attorney.

APPENDIX D

HOLBROOK BRADLEY ET AL., PLAINTIFFS

v.

HENRY A. KISSINGER ET AL., DEFENDANTS

Civ. A. No. 76–0085

United States District Court, District of Columbia

June 30, 1976

MEMORANDUM AND ORDER

GESELL, *District Judge.*

This action is brought by ten Foreign Service employees of the Department of State or the United States Information Agency who have been or will be subject to mandatory retirement at age 60, pursuant to Section 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. § 1002 (FSA). The eleventh plaintiff is an organization purporting to represent both former and present Foreign Service officers subject to this retirement provision. The named plaintiffs seek to maintain the suit as a class action.

Plaintiffs' primary claim is that as a matter of statutory construction the age 60 retirement mandated by FSA has been superseded and repealed by the Age Discrimination in Employment Act of 1967, as amended in 1974, 29 U.S.C. § 633a (ADEA).[1] The

[1] Alternatively, the complaint alleges violations of due process and equal protection, arbitrary and invidious classification, discrimination in application of existing regulations and failure of the Civil Service Commission properly to implement the Act.

complaint prays generally for declaratory and injunctive relief, as well as for reinstatement, back pay and other monetary relief pursuant to 29 U.S.C. § 633a(b) for persons already subjected to mandatory retirement. The parties have cross-moved for summary judgment on this question of statutory interpretation and plaintiffs have also moved for class certification which the federal defendants oppose. These motions were fully briefed and argued and are now before the Court for decision.

On April 13, 1976, the named plaintiffs filed a motion under Fed.R.Civ.P. 23(c)(1) for class action certification seeking to represent the following persons:

> All Foreign Service Officers and Foreign Service Information Officers, age 40 or older, who have been, or are now employed by the defendant Department of State or the defendant United States Information Agency, and who in the past six years have been subjected to, or are subject in the future to, mandatory retirement at age 60, pursuant to the rules, policies and practices of the defendant agencies or pursuant to Sec. 632 of the Foreign Service Act of 1946, as amended, 22 U.S.C. 1002.

Plaintiffs seek certification of their case as a "(b)(2)" class action.

[1,] This putative class consists of two categories of plaintiffs: present employees and past employees who have already been mandatorily retired under FSA since 1974. As to the latter, the Court concludes that the group cannot be included in a class action here. The relief requested for these people consists of reinstatement and back pay pursuant to 29 U.S.C. § 633a(b). However, none of the plaintiffs who purported to represent these individuals have complied with the statutory requirement that notice of intent to bring such a suit must be given to the Civil Service Commission within 180 days after the alleged unlawful practice, 29 U.S.C. § 633a(d). Since the jurisdictional prerequisite has not been satisfied by any of the named plaintiffs, there is no representative of this group properly before the Court.[2] Moreover, since reinstatement is sought, the interests of such people may well conflict with those of present employees who are also defined as part of the class. *Cf., e. g., Freeman* v. *Motor Convoy, Inc.*, 409 F.Supp. 1100, 1113 (N.D.Ga. 1976). Accordingly, past employees who have already been retired are not within a proper class.

As to the category of present employees, who seek declaratory and injunctive relief rather than the remedies created by the ADEA, certain of these individuals are sufficiently threatened with imminent mandatory retirement to entitle them to prosecute this suit. The only question, therefore, is whether they can maintain the case as a class action. Defendants, citing section 7(b) of the ADEA, 29 U.S.C. § 626(b), and section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), argue that a class action can never be brought for age discrimination in Federal Government employment. In support of this contention they rely primarily on *LaChapelle* v. *Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975), which held that Rule 23

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[2] The statute is open to the construction that every member of the class of past employees would have to meet this requirement, *cf. Freeman* v. *Motor Convoy, Inc.*, 409 F. Supp. 1100, 1114–16 (N.D.Ga. 1976), but under the facts of the present case the Court finds it unnecessary to consider this question.

class actions are inappropriate in age discrimination suits against private employers. *See also Schmidt* v. *Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975). Plaintiffs correctly point out in response that there are significant differences between the governmental and private situations. In particular, the statutory section applicable to the Government, unlike that pertaining to private parties, does not provide that it is to be enforced under the Fair Labor Standards Act. Rather, it expressly provides that enforcement shall be by the Civil Service Commission, 29 U.S.C. § 633a(b), and that aggrieved persons may under appropriate circumstances file civil actions in Federal District Court, 29 U.S.C. § 633a(c, d). The Court need not resolve this issue, however, since it finds in any event that the record at this time does not support the certification of a class under Fed.R.Civ.P. 23. First, it is unclear whether plaintiffs have satisfied the basic requirement of numerosity and impracticability of joinder. Defendants dispute plaintiffs' estimate of the number of people involved, and the present record, without some discovery by plaintiffs, does not sufficiently inform the Court of the facts. This conclusion is also reinforced by the above determination that only present employees may be members of the class, which reduces even further the probative value of plaintiffs' preliminary appraisals. Moreover, as will be more fully discussed below, the mandatory age provision is part and parcel of a larger retirement system. Some employees may not object to being retired at age 60 in order to enjoy the benefits afforded by this system, and the interests of such people may well be jeopardized if plaintiffs prevail. Therefore, it cannot be said that there are common interests between the named plaintiffs and the members of the asserted class. Finally, even in the absence of a class, appropriate equitable relief can be fashioned, if warranted, which will as a practical matter protect those people plaintiffs seek to represent, and therefore it is unnecessary and inadvisable to encumber this suit with the burdens of a class action, *see, e.g., Berlin Democratic Club* v. *Rumsfeld,* 410 F.Supp. 144, 163-64 (D.D.C. 1976). The Court thus concludes that class certification is inappropriate, at least at this time.

Accordingly, a class action cannot be maintained on the question of statutory interpretation that is now presented. Of course, this is without prejudice to a renewed motion at a later time or on the other issues in this case if they are to be litigated. And since the matter of a class action is of little practical consequence to the resolution of the substantive statutory issue or the granting of prospective declaratory or injunctive relief, the Court will proceed to consider the merits of plaintiffs' claim.

Section 632 of FSA (22 U.S.C. § 1002) provides:

> Any participant in the Foreign Service Retirement and Disability System, other than one occupying a position as chief of mission or any other position to which he has been appointed by the President, by and with the advice and consent of the Senate, who is not a career ambassador or a career minister shall, upon reaching the age of sixty, be retired from the Service and receive retirement benefits in accordance with the provisions of section 1076 of this title, but whenever the Secretary shall determine it to be in the public interest, he may extend such participant's service for a period not to exceed five years.

Section 15 of ADEA (29 U.S.C. § 633a) provides:

> (a) *All personnel actions affecting employees* . . . in military departments as defined in

> section 102 of title 5, United States Code, *in executive agencies as defined in section 105 of title 5, United States Code* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress *shall be made free from any discrimination based on age.*[3] (Emphasis added.)

Based on the conflict between these provisions, plaintiffs argue that the ADEA implicitly repealed this section of the FSA. Defendants disagree, contending that the two provisions are not in irreconcilable conflict since the FSA concerns only mandatory retirement at age 60 and does not affect the conceded applicability of the ADEA to all other personnel action. They also point out that the FSA is the more specific and narrow of the two statutes, thus making it unlikely that Congress intended to repeal it by subsequently enacting the ADEA.

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[3] 5 U.S.C. § 105 States:

"For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment."

5 U.S.C. § 101 states:

"The executive departments are: The Department of State . . ."

5 U.S.C. § 104 states:

"For the purpose of this title, "independent establishment" means—(1) an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; . . ."

The parties are in agreement that repeals by implication are disfavored. As the Supreme Court recently explained:

> It is a basic principle of statutory construction that a statute dealing with a narrow, precise and specific subject is not submerged by a later-enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton* v. *Mancari,* 417 U.S. 535, 550–551 [94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 301]. "The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." T. Sedgwick, Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1974).
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> * * * * *
>
> The issue thus boils down to whether a "clear intention otherwise" can be discovered—whether, in short, it can be fairly concluded that the [later statute] operated as a *pro tanto* repeal of [the earlier one]. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *United Continental Tuna Corp.,* 425 U.S. 164, 168 [96 S.Ct. 1319, 1322, 47 L.Ed.2d 653, 658]. There are, however,
>
> "two well-settled categories of repeals by implication—(1) where provisions in the

> two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest. . . ." *Posadas* v. *National City Bank*, 296 U.S. 497, 503 [56 S.Ct. 349, 352, 80 L.Ed. 351, 355].
>
> * * * * *

The statutory provisions at issue here cannot be said to be in "irreconcilable conflict" in the sense that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Morton v. Mancari, supra,* [417 U.S.] at 551 [94 S.Ct. at 2483, 41 L.Ed.2d at 301]. As the Court put the matter in discussing the interrelationship of the antitrust laws and the securities laws, "[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 [83 S.Ct. 1246, 1257, 10 L.Ed. 2d 389, 400]. *Radzanower v. Touche Ross & Co.*, —— U.S. ——, ——, 96 S.Ct. 1989, 1992, 48 L.Ed.2d 540 (1976) (footnotes omitted).

Of particular significance here to this inquiry into presumed legislative intent is the fact that Congress has recently extended the mandatory retirement pro-

vision of the FSA to cover certain Foreign Service officers or employees of the Agency for International Development, 87 Stat. 713, Pub.L.No. 93–188, 1973 U.S. Code Cong. & Admin. News 781, 792–94.[4] By this action Congress expressly indicated its belief that the Foreign Service and Retirement System provided more favorable conditions for retirement than did the Civil Service Retirement and Disability Fund and that such advantageous treatment was warranted to compensate these people for some of the personal difficulties they suffered during overseas service, H.Rep.No. 93–388, 93d Cong., 1st Sess., 1973 U.S. Code Cong. and Admin. News 2806, 2845–47. Such legislative action, affecting some 2500 individuals (*id.*) and undertaken contemporaneously with the 1974 extension of the ADEA to the Federal Government,[5] is surely expressive of legislative intent on the question of whether the mandatory retirement provision of the FSA was impliedly repealed by the 1974 amendments to the ADEA.

The Court finds it unnecessary, however, to decide this issue as formulated by plaintiffs. Section 4(f) of the ADEA, 29 U.S.C. § 623(f), provides:

> (f) It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee

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[4] *See also* 22 U.S.C. § 1229(c). This statute was passed in 1968, after the initial enactment of the ADEA but before the 1974 amendments making the Act applicable to the Federal Government.

[5] The Foreign Assistance Act of 1973, of which the AID measure was a part, was passed by the House on December 4, 1973, and by the Senate on December 5, 1973. The 1974 amendments to the ADEA, which were included in the Fair Labor Standards Amendment of 1974, were enacted by both the House and the Senate on March 28, 1974.

> benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual . . .

This provision, which was part of the 1967 ADEA, is clearly incorporated in the 1974 amendment and thus applicable to the Federal Government, so that any personnel action falling within its terms cannot be deemed to be "discrimination based on age," 29 U.S.C. § 633a(a). This view is expressly supported by the legislative history of the 1974 amendments. For example, as Senator Bentsen commented when he introduced the original bill (S. 3318) to extend the ADEA to federal employees:

> Of course, Mr. President, I recognize that there are instances in which age is a legitimate factor in determining whether an individual should be hired or encouraged to retire. The Act of 1967 says very plainly that it is not unlawful for an employer to take any actions otherwise prohibited "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," or *"to observe the terms of a bona fide seniority system or any bona fide employee benefit plan—which is not a subterfuge to evade the purposes of this act."*
>
> *I am not concerned with situations that fall within these categories, but I am concerned about documented instances in which Government employees have been flatly told or indirectly pressured to retire solely because of their age* . . . 118 Cong. Rec. 7745 (1972) (emphasis added).

The House Report similarly indicates that federal employees were entitled to the same protections that private employees had received under the 1967 Act:

> The Committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal . . . government levels *as it has and continues to do in private employment.* H.Rep.No.93–913, 93d Cong., 2d Sess., 1974 U.S.Code Cong. and Admin. News 2850 (emphasis added).

Thus the cases that have interpreted 29 U.S.C. § 623 (f) as it applies in the private sector, *e.g., Brennan* v. *Taft Broadcasting Co.,* 500 F.2d 212 (5th Cir. 1974), are relevant here.

The Foreign Service Retirement and Disability System, 22 U.S.C. §§ 1061–1116, was originally enacted as part of the FSA and is administered by the Secretary of State in accordance with rules and regulations prescribed by the President. Central to the System is the annuity program described in 22 U.S.C. § 1076, which section is expressly cited and incorporated in the mandatory retirement provision, 22 U.S.C. § 1002. Under the controlling law this System, with its compulsory contributions by and annuity payments to participants in the program, is clearly a bona fide system or plan within the meaning of the statute. This also appears to have been at least the implicit view of Congress when it recently extended the System to include certain AID employees, *discussed supra.* Accordingly, under 29 U.S.C. § 623(f), the mandatory retirement provision of the FSA is not inconsistent with or in violation of the ADEA.

For the foregoing reasons, plaintiffs' motion to certify a class is denied. Defendants' motion to dismiss or for summary judgment on Count I of the complaint is granted, plaintiffs' cross-motion for summary judgment is denied, and Count I of the complaint shall be and hereby is dismissed.

A status conference to schedule further proceedings, if any, see *Massachusetts Board of Retirement* v. *Murgia,* —— U.S. ——, 96 S.Ct. 2562, 49 L.Ed.2d —— (1976), is set for 11:30 a.m. on July 13, 1976.

So ordered.

U.S. GOVERNMENT PRINTING OFFICE: 1979